



Refusal to grant adoption of a child in *kafala* care was not in breach of respect for private and family life

The European Court of Human Rights has today notified its **Chamber judgment**¹ in the case of **Chbihi Loudoudi and Others v. Belgium** (application no. 52265/10).

The case concerned a refusal by the Belgian authorities to grant an application by Mr Chbihi Loudoudi and Ms Ben Said for the adoption of their Moroccan niece, for whom they were caring on the basis of *kafala*, an institution under Islamic law, defined as a voluntary undertaking to provide for a child's welfare, education and protection².

The Court held, by a majority, that there had been:

No violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights concerning the refusal to grant the adoption;

No violation of Article 8 (right to respect for private and family life) of the Convention concerning the child's residence status.

The Court found that the refusal to grant adoption was based on a law which sought to ensure, in accordance with the relevant Hague Convention, that international adoptions took place in the best interests of the child and with respect for the child's private and family life, and that the Belgian authorities could legitimately consider that such a refusal was in the child's best interests, by ensuring the maintaining of a single parent-child relationship in both Morocco and Belgium (i.e. the legal parent-child relationship with the genetic parents). In addition, reiterating that the Convention did not guarantee a right to a particular residence status, it observed that the only real obstacle encountered by the girl had been her inability to take part in a school trip. That difficulty, owing to the absence of a residence permit between May 2010 and February 2011, did not suffice for Belgium to be required to grant her unlimited leave to remain in order to protect her private life.

Principal facts

The applicants – Brahim Chbihi Loudoudi and Loubna Ben Said, a married couple who are both Belgian nationals, and their niece, a Moroccan national – were born in 1953, 1966 and 1995, respectively, and live in Brussels.

In March 2001 Mr Chbihi Loudoudi and Ms Ben Said looked into the possibilities for bringing to Belgium a child that they wished to adopt. In September 2002 their niece K.B.'s genetic parents gave their approval for a *kafala* arrangement. The child was thus entrusted to their care, by her parents, for the applicants (as *khafils*) to "look after all her interests ... and provide for the general needs of her life; to travel with her, whether inside or outside Morocco, and to accommodate her with them when abroad".

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

² See *Harroudj v. France* (43631/09), 4 October 2012, § 16

The *kafala* agreement was certified and approved in 2002 by the judge responsible for notarial matters at the Meknes Court of First Instance (Morocco). On 19 August 2003 a deed of simple adoption was drawn up by a notary in Belgium and the child arrived in the country on 8 December 2005. However, upon an application by Mr Chbihi Loudoudi and Ms Ben Said, the Belgian courts refused to approve the deed.

On 19 May 2009 the applicants lodged a fresh application for the adoption of a Moroccan child, which was rejected at first instance and then on appeal in a judgment of 19 May 2010. The Court of Appeal confirmed that the statutory conditions were not met for an adoption, as the *kafala* agreement entered into in Morocco did not concern a case where a child had been entrusted by the competent authorities of the child's State of origin to the adoptive parents; in this case the child had been entrusted by her parents. The court took the view that the requested adoption would create a legal parent-child relationship which was not constituted by the *kafala* arrangement and therefore a new legal status.

The applicants subsequently applied for legal aid in order to lodge an appeal on points of law. The legal aid board rejected their request in July 2010 based on the opinion of a lawyer at the Court of Cassation that the appeal had no prospect of success. The applicants dropped their appeal.

Following her arrival in Belgium, the child, K.B., was granted a temporary residence permit, which was renewed at regular intervals. After the second set of adoption proceedings had ended, she was left without a residence permit for seven months. On 16 February 2011 she was again issued with a temporary residence permit, which was renewed several times. Her application for a permit of unlimited duration was rejected for the last time in March 2013 by the Aliens Office, on the ground that it was premature, as the girl had only had a residence permit since March 2011. In April 2014 she was finally granted indefinite leave to remain.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), the applicants complained that the Belgian authorities had, to the detriment of the child's best interests, refused to recognise the *kafala* arrangement and to approve the adoption of their niece; they also complained about the uncertainty of her residence status. Under Article 14 (prohibition of discrimination) in conjunction with Article 8, they further alleged that they had been discriminated against on grounds of origin. Lastly, they contended that the refusal of legal aid for an appeal on points of law had infringed Article 6 § 1 (right of access to a court).

The application was lodged with the European Court of Human Rights on 25 August 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido Raimondi (Italy), *President*,
 Işıl Karakaş (Turkey),
 Nebojša Vučinić (Montenegro),
 Helen Keller (Switzerland),
 Paul Lemmens (Belgium),
 Egidijus Kūris (Lithuania),
 Robert Spano (Iceland),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

Article 8

Refusal to grant adoption of K.B.

The Court began by finding that in the present case Article 8 was applicable in its “family life” aspect. Mr Chbihi Loudoudi and Ms Ben Said had been looking after their niece, as if they were her parents, since the age of seven and they had all been living together in a manner which could not be distinguished from family life in its ordinary meaning.

The Court then sought to ascertain whether or not the refusal by the Belgian courts to grant the adoption of K.B. ran counter to the proper development of a family relationship between her and her *khafils*. The Court did not call into question the interpretation of the Belgian law by the domestic courts, which had taken the view that the legal conditions for an adoption had not been met, on the grounds that the child had not been entrusted to the would-be adoptive parents by the competent “authority” of the child’s State of origin.

The Court verified, however, whether the child’s “best interests” had been taken into account. It observed in this connection that the refusal to grant the adoption had had a legal basis³ seeking to prevent any improper use of adoption and to respect private and family life, those being among the aims pursued by the relevant Hague Convention⁴. In addition, the courts, taking into account the existence of a legal parent-child relationship with K.B.’s genetic parents in Morocco, had identified the risk of her not having the same personal status in Belgium as in Morocco. The Belgian authorities had thus been entitled to consider that their refusal to grant adoption was in the child’s best interests, by ensuring the maintaining of a single parent-child relationship in both countries. Moreover, that refusal had not deprived the applicants of all recognition of the relationship between them, because the procedure of unofficial guardianship was still open to them – an arrangement resembling *kafala* – even though its outcome was uncertain. Lastly, the applicants had not referred to any practical obstacle that they would have to overcome, as a result of the situation, in order to pursue their family life and K.B. had only complained about the uncertainty surrounding her residence status.

Consequently the Court found that there had been no violation of Article 8, in the absence of any breach of the right to respect for the applicants’ family life or for K.B.’s private life.

K.B.’s residence status

The applicants argued that the authorities’ delay in ruling on their request for status under the Aliens Act, and the successive fixed-term residence permits, had created a situation of instability and uncertainty for K.B.

This complaint concerned the period following the Court of Appeal’s judgment of 19 May 2010 bringing the second adoption procedure to a negative end. Over the following seven months, the girl had found herself without a residence permit at all and subsequently, for the next three years, the Belgian authorities had refused to issue her with a permit of unlimited duration, preferring to renew her temporary permit.

The Court noted that K.B. had lived continuously in Belgium with her *khafils* since her arrival in the country in 2005 and that, with the exception of that seven-month period, she had lived there legally and had been able to travel freely to spend her holidays in Morocco. Additionally, she appeared to be perfectly integrated into Belgian society and had successfully completed her secondary-school studies without impediment. While the Court was aware of the frustration and stress caused by the

³ Law of 6 December 2005 amending certain provisions concerning adoption.

⁴ Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption

situation, it found, pointing out that the Convention did not guarantee a right to a particular type of residence status, that the only real obstacle encountered by the girl had been her inability to take part in a school trip, owing to the absence of a residence permit between May 2010 and February 2011. It was unreasonable to consider, merely on the basis of that consequence, that Belgium was required to grant her unlimited leave to remain in order to protect her private life. Accordingly, the Court found that there had been no violation of Article 8.

Article 14 taken together with Article 8

The Court took the view that the applicants' inability to adopt K.B. had already been examined under Article 8. Having regard to its finding of no violation of that provision, the Court found no violation of Article 14.

Article 6 § 1

The Court, reiterating that the Belgian system of legal aid ensured the protection of the individual against arbitrariness, took the view that the refusal by the legal aid board had not breached, in its essence, the applicants' right of access to a court, especially as they had been able to present their case on appeal. Consequently, the Court dismissed this complaint as being manifestly ill-founded.

Separate opinion

Judges Karakas, Vučinić and Keller expressed a joint dissenting opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.